Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-98
INTERCONNECTION BETWEEN LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS	CC Docket No. 95-185

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION TO U S WEST REQUEST FOR A STAY PENDING JUDICIAL REVIEW

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association, an organization consisting of nearly 500 resale carriers and their underlying product and service suppliers, urges the Commission to summarily deny the "Request for A Stay Pending Judicial Review" filed by U S West, Inc., in the captioned docket and to permit the rules adopted in the First Report and Order implementing the local telecommunications competition provisions of the Telecommunications Act of 1996 to become effective as currently scheduled. Like the "Joint Motion for Stay Pending Judicial Review" recently filed by GTE Corporation and the Southern New England Telephone Company, U S West's Request for Stay represents yet another effort by a large incumbent local exchange carrier to preserve its "bottleneck" control of local exchange networks, and the competitive advantages attendant thereto, as it ventures into the interexchange market by delaying the advent of the local telecommunications competition the Congress envisioned in enacting the Telecommunications Act of 1996. U S West has proven to be no more successful than were GTE and SNET in demonstrating that the extraordinary relief it has requested is warranted; indeed, like GTE and SNET before it, U S West has failed to satisfy any the four tests for grant of a stay.

The Commission has already addressed and rejected the objections raised by U S West to the First Report and Order, denying each on sound legal and policy grounds. Like that asserted by GTE and SNET, the irreparable injury claimed by U S West is far too speculative to warrant grant of the requested stay. Conversely, grant of the stay would harm new entrants into the local telecommunications market, particularly smaller providers such as those that comprise the rank and file of TRA. And the public interest certainly would not be served by

delaying the availability of competitive local telecommunications services offerings. In short, U S West has not made the threshold showing necessary to warrant serious consideration, much less grant, of the extraordinary relief it requests.

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the "Request for A Stay Pending Judicial Review" ("Request for Stay") filed by U S West, Inc. ("U S West") in the captioned docket. In its Request for Stay, U S West urges the Commission to stay in its entirety the effectiveness of the First Report and Order, FCC 96-325 (released August 8, 1996), and the rules adopted therein. However, in support of the extraordinary relief it seeks, U S West merely reargues matters already addressed and disposed of by the Commission in the First Report and Order.

Like the "Joint Motion for Stay Pending Judicial Review" recently filed by GTE Corporation ("GTE") and the Southern New England Telephone Company ("SNET") ("Joint

Motion"), U S West's Request for Stay represents yet another effort by a large incumbent local exchange carrier ("ILEC") to preserve its "bottleneck" control of local exchange networks, and the competitive advantages attendant thereto, as it ventures into the interexchange market by delaying the advent of the local telecommunications competition the Congress envisioned in enacting the Telecommunications Act of 1996,[1] U S West has proven to be no more successful than were GTE and SNET in demonstrating that the extraordinary relief it has requested is warranted; indeed, like GTE and SNET before it, U S West has failed to satisfy any the four tests for grant of a stay. TRA, accordingly, urges the Commission to summarily reject U S West's Request for Stay.

I.

INTRODUCTION

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

actively reselling international, wireless, enhanced and internet services.[2] TRA's resale carrier members are also poised to enter the local telecommunications market and to bring to small business and residential users of local service the affordable rates, service diversity and personalized customer service that has allowed them to capture a five to ten percent share of the interexchange market in less than a decade.

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[3] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[4] Thus, an applicant for stay must show that (i) it is likely to succeed on the

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[2] TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of the resale industry over the past five to ten years have produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

[3] *See, e.g.,* Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

[4] *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest. While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[5]

As noted above, U S West has satisfied none of these four criteria in its Request for Stay. U S West objects to two elements of the Commission's First Report and Order, which, it opines, "conflict[], and cannot be reconciled, with the basic command of the Telecommunications Act of 1996 that the terms for network interconnection be set by 'negotiation' of a 'binding agreement' between the parties."[6] Specifically, U S West complains that "[b]y prescribing a set of default interconnection prices, and by granting would-be interconnectors the right to pick and choose freely, term by term, from the provisions of previously negotiated agreements, the Commission has destroyed any opportunity for true negotiations or binding agreements."[7]

As noted above, the Commission has already addressed and rejected these objections, denying them on sound legal and policy grounds. Like that asserted by GTE and SNET, the irreparable injury claimed by U S West is far too speculative to warrant grant of the requested stay. Conversely, grant of the stay would harm new entrants into the local

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[5] *See, e.g.,* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

[6] U S West Request for Stay at i.

[7] Id.

telecommunications market, particularly smaller providers such as those that comprise the rank and file of TRA. And the public interest certainly would not be served by delaying the availability of competitive local telecommunications services offerings.

In short, U S West has not made the threshold showing necessary to warrant serious consideration, much less grant, of the extraordinary relief it requests. Accordingly, U S West's Request for Stay should be summarily denied and the pro-competitive rules adopted by the Commission in the First Report and Order should be allowed to take effect without delay.

II.

ARGUMENT

A. The Small Carriers That Comprise the Rank And File Of TRA Would Be Harmed If The Requested Stay Were Granted

As TRA explained in opposing the GTE/SNET Joint Motion, it is an association comprised in large part of small carriers serving primarily small business and residential users. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded less than a decade ago. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate annual revenues of $5 million or less and less than 20 percent have reached the $50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have workforces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. And in addition to domestic interexchange and

international service, a sizeable percentage of TRA's resale carrier customers are already offering their customers enhanced, wireless and/or internet access services, and will soon be providing local telecommunications service as well.[8]

In crafting rules implementing Sections 251 and 252 of the 1996 Act,[9] the Commission was cognizant of the hurdles small carriers, as new entrants into the local telecommunications market, would face in confronting entrenched incumbent local exchange carriers ("ILECs") possessed not only of monopoly market power, but orders of magnitude greater resources. Thus as a general matter the Commission explained that it adopted "national rules" where:

> they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.[10]

Such an approach, the Commission correctly reasoned, would "assist smaller carriers that seek to provide competitive local service:"

> [N]ational rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state. We agree with the Small Business Administration that

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[8] The data summarized in this section are drawn from a series of surveys undertaken by TRA of its membership over the past two years.

[9] 47 U.S.C. §§ 251, 252 (1996).

[10] First Report and Order, FCC 96-325 at ¶ 41.

> national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities. In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets.[11]

Detailing its rationale for so concluding, the Commission emphasized the "inequality of bargaining power between incumbents and new entrants," explaining that "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."[12] Rather, "[u]nder section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market."[13] Given the "strong incentives" ILECs, like any other monopolists, will have to resist such market intrusion, "rules that have the effect of equalizing bargaining power" are necessary to facilitate competitive entry.[14]

In comments, reply comments and ex parte presentations, TRA strongly and repeatedly urged the Commission to adopt rules and policies which would remedy, at least in some small measure, the inequality of bargaining power between ILECs and small carriers seeking to enter the local telecommunications market. The Commission responded to the concerns voiced by the small carrier community not only by adopting national rules and

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[11] Id. at ¶ 61 (footnotes omitted).

[12] Id. at ¶ 55.

[13] Id.

[14] Id.

guidelines, but by promulgating requirements specifically designed to constrain the abuse by ILECs of their overwhelming negotiating leverage. Among the safeguards so adopted by the Commission are the default interconnection, unbundled network element and service pricing proxies and the "term-by-term 'most favored nation' rights" of which U S West vociferously complains here.

TRA applauds the Commission for its foresight and its courage in recognizing the need, and in endeavoring, to equalize the bargaining power of ILECs and new market entrants, particularly small carriers. TRA submits that the Commission was entirely correct in its assessment that small carriers simply do not have the leverage to exact equitable service arrangements from ILECs absent guidelines which establish outer bounds of reasonableness and safeguard against discrimination. As the Commission has correctly noted, the ability to obtain rates within a prescribed range of reasonableness and to secure "favorable terms and conditions -- including rates -- negotiated by large IXCs" are critical to market entry and survival by "smaller carriers who lack bargaining power" and therefore necessary to "speed the emergence of robust competition."[15]

Because of the massive disparity in bargaining power, U S West's suggestion that "a stay will not harm requesting interconnectors, other LECs, or members of the public because the schedule of private negotiation and arbitration under the Act will continue unfettered"[16] is highly disingenuous. Certainly, U S West is correct that negotiations would go forward during the pendency of any stay, but they would progress only so far as ILECs like U S West allowed.

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[15] Id. at ¶ 1313.

[16] U S West Request For Stay at 16.

ILECs would dictate terms to small carriers which would then be confronted with a "Hobson's Choice" -- have either no local service offering or an offering which was not economically viable. As TRA stressed in opposing the GTE/SNET Joint Motion, time is a precious commodity in the rapidly changing telecommunications environment; for small carriers, full service offerings will become increasingly more important to competitive viability and customer retention over the coming months and years, particularly as ILECs aggressively enter the interexchange market with long distance and local products. Accordingly, if the requested stay were granted, some small carriers might not survive long enough to derive the eventual benefits of the Commission's pro-competitive approach.

Clearly then, small carriers would be severely harmed by stay of the effectiveness of the rules adopted by the Commission to constrain negotiating abuses by ILECs.

B. The Public Interest Would Not Be Served By Grant Of The Requested Stay

As TRA noted in addressing assertions by GTE and SNET that the public interest would be served by grant of a stay, Congress has determined that the public interest would be best served by "opening all telecommunications markets to competition;" to this end, Congress not only eliminated all legal barriers to market entry, but set about to dismantle the local exchange "bottleneck" by mandating elimination of technical and economic barriers to entry.[17] In the First Report and Order, the Commission recognized the pro-competitive intent of Congress

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[17] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 113 (1996) ("Joint Explanatory Statement"); 47 C.F.R. §§ 251, 252, 253.

as embodied in the 1996 Act, emphasizing the need to remove all entry barriers if local telecommunications competition is to emerge:

> The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress . . . [T]he removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. . . . Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. . . . The statute also directs us to remove the existing operational barriers to entering the local market.[18]

As the Commission has repeatedly stressed in assessing stay requests in the past, the public is harmed by "a diminution in competition;" stays which "prevent achievement of the public interest benefits . . . [which] will flow from a more competitive . . . market" will be denied.[19] Elsewhere, the Commission has further declared that where "the Congress has explicitly found that the goal of increased competition 'promote[s] the public interest,'" grant of a stay of implementing Commission rules "is not in the public interest."[20] Certainly, the Commission has made clear that consumers should not be denied the benefits of rules adopted to further the public

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[18] First Report and Order, FCC 96-325 at ¶¶ 1, 10, 11, 16 (footnotes omitted).

[19] *See, e.g.,* Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 9; *see also* Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214, ¶ 32 (1995) ("[W]e conclude that a stay . . . will not be in the public interest . . . a stay will delay the introduction of new competition and new services to the public").

[20] Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192, ¶ 6 (1995).

interest simply to protect the private interests of individual parties seeking to delay implementation of those rules.[21]

U S West argues that "robust competition among providers of local telephone service is best furthered through the private, situation-specific negotiation of interconnection agreements" and hence that the public interest favors grant of the requested stay.[22] If the requested stay were granted, however, the "competition" would be on terms dictated by the ILECs and hence far from "robust." Absent Commission mandated default pricing proxies and the ability to "obtain favorable terms and conditions -- including rates -- negotiated by large IXCs," small carriers could not hope to secure competitively viable offerings in one-on-one negotiations. As the Commission has correctly recognized, ILECs "have strong economic incentives" to deny new market entrants "rates, terms and conditions that are just, reasonable, and nondiscriminatory," and small carriers "lack the bargaining power" to compel such equitable terms.[23] Thus, as the Commission has recognized, default pricing proxies and unbundled access to agreement provisions, not unrestrained exercise of ILEC bargaining power, will "speed the emergence of robust competition."[24]

U S West's self-serving claims notwithstanding, the public interest does not favor grant of the requested stay.

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[21] *See, e.g.,* Dynamic Cablevision of Florida, Ltd., 10 FCC Rcd. 7738, ¶ 16 (1995).

[22] U S West Request For Stay at 16.

[23] First Report and Order, FCC 96-325 at ¶¶ 55, 61, 1313.

[24] Id. at ¶ 1313.

C. Petitioners Have Failed To Demonstrate That They Will Suffer Irreparable Harm Absent A Stay

As it must, U S West opines that it will suffer irreparable harm if the stay it requests is not granted. According to U S West, it will be irreparably harmed by the "destruction of [its] statutory right to conduct voluntary interconnection negotiations free from the influence of presumptive terms dictated by the Commission's rules."[25] The harm would be irreparable, U S West contends, because "[e]ven if the Commission's rules are later struck down on judicial review, it will be impossible in practice to revisit the hundreds of issues in both negotiated and arbitrated interconnection agreements whose terms will have been dictated by the Commission's default pricing and 'most favored nation' rules."[26] Accordingly, U S West concludes with a flourish, "[a]bsent immediate relief, [its] interconnection relationships, and indeed the entire path of the industry-wide restructuring mandated by the Act, will be irrevocably altered."[27]

As with the claims of GTE and SNET before it, U S West's allegations of irreparable harm are predicated on speculation layered upon speculation layered upon speculation. The Commission has long held that "[t]o show irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.'"[28] Moreover, the Commission has required that "the party seeking relief must show that 'the injury complained of [is] of such imminence that

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[25] U S West Request For Stay at 14.

[26] Id. at 15.

[27] Id.

[28] *See, e.g.,* Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214 at ¶ 29 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

there is a 'clear and present' need for equitable relief to prevent irreparable harm."'[29] As the Commission has steadfastly held, "[b]are allegations of what is likely to occur are of no value since the [Commission] must decide whether the harm will in fact occur. The movant must provide . . . proof indicating that the harm is certain to occur in the future."[30] "[U]nsubstantiated and speculative claims," "generalized assertions," and contentions that "recoupment . . . in the future is 'simply not realistic'" have all been found by the Commission to be inadequate to support a claim of irreparable harm and the grant of a stay.[31]

Here, U S West speculates as to the course and outcome of myriad negotiations. It speculates as to the negotiating positions and tactics of countless new market entrants and the nature and extent of concessions that such entities might or might not make or might or might not extact during the negotiation process. Not content merely to speculate as to negotiations, U S West speculates as to the behavior of various States, not only in the conduct of arbitrations, but in determining the timing and outcome of State-conducted cost studies; indeed, U S West simply assumes that all States will utilize the Commission's default pricing proxies. Stretching still further, U S West speculates as to the behavior of multiple parties, including the Commission

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[29] Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶ 19, fn. 53 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), *quoting* Ashland Oil, Inc. v. FTC, 409 F.Supp 297, 307 (D.D.C.), *aff'd* 548 F.2d 977 ((D.C. Cir. 1976)).

[30] Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991, ¶ 14 (1995) (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[31] *See, e.g.,* Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192 at ¶ 5; Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991 at ¶¶ 14-16; Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶¶ 18-19; Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 8; Cincinnati Bell Telephone Company, 8 FCC Rcd. 6709, ¶ 10 (1993).

itself, following any revision to the Commission's rules and policies on appeal. Aggregating so many layers of speculation obviously renders any claim of irreparable harm hopelessly amorphous.

U S West obviously cannot predict the behavior of new market entrants or State regulatory authorities or anticipate the outcome of multi-party undertakings. Moreover, U S West has no way of predicting whether individual States would have been, or will be, more or less stringent than the Commission in their application of Sections 252 (d) and (i) the 1996 Act.[32] Given these limitations, any claims of harm, much less irreparable harm, voiced by U S West are without solid foundation. Certainly, U S West's "showing" of harm is not "certain," "great," "imminent" or "certain to occur," as required by the Commission. Rather, it falls into that unfortunate category of showings disdainfully referred to in Commission decisions as "unsubstantiated and speculative claims" and "generalized assertions." Contrary to Commission requirements, U S West's "showing" of harm is far more "theoretical" than "actual." In short, the impact on U S West of the Commission rules to which it objects is subject to far too many variables to predict with any degree of confidence.

Perhaps even more critically, however, the harm of which U S West complains is the result intended by Congress. As discussed above, Congress intended that the local exchange "bottlenecks" be dismantled and that all telecommunications markets be not only "contestable," but "contested." As the Commission properly recognized, competition will not flourish absent some effort to equalize the bargaining power of ILECs and new market entrants.

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[32] 47 U.S.C. §§ 252 (d), (i).

D. Petitioners Have Not Shown A Likelihood of Success On The Merits On Appeal

As noted earlier, U S West objects to two elements of the First Report and Order, U S West contends that the Commission's prescription of default pricing proxies for interconnection, unbundled network elements and services, as well as its grant to would-be interconnectors of the right to pick and choose freely, term by term, from the provisions of previously negotiated agreements "conflict[], and cannot be reconciled, with the basic command of the Telecommunications Act of 1996 that the terms for network interconnection be set by 'negotiation' of a 'binding agreement' between the parties."[33]

As was the case with the GTE and SNET Joint Motion, U S West is here simply repeating positions and arguments already addressed and rejected by the Commission in a reasoned and fully defensible manner. U S West presents no new or different arguments or information here which would draw into question or warrant modification of the implementing rules and policies adopted by the Commission in the First Report and Order. Hence, summary denial of the U S West Request for Stay would be appropriate.

The Commission fully justified its reading of Section 252(i). Section 252(i) requires ILECs to "make available any interconnection, service or network element provided under any agreement approved under [Section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[34] The Commission reasonably concluded that "[r]equiring requesting carriers to

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[33] U S West Request for Stay at i.

[34] 47 U.S.C. §§ 252 (i).

elect entire agreements, instead of the provisions relating to specific elements, would render mere surplusage the words 'any interconnection, service, or network element.'"[35] It is well established that statutory language should not be construed so as to be rendered meaningless. Indeed, the U.S. Supreme Court has mandated that "courts should construe all legislative enactments to give them some meaning."[36] Thus, the Commission's interpretation of Section 252(i) is solidly grounded in law.

Moreover, the Commission demonstrated that its view was supported by the legislative history of the 1996 Act[37] and pedicated on sound policy and practical considerations. Thus, the Commission explained that the reading of Section 252(i) advocated by U S West could be abused by ILECs to effectively restrict the availability of entire agreements, much less individual elements thereof, and that its interpretation in contrast would prevent such abuses, limit delay and "speed the emergence of robust competition."[38] Given that U S West in order to prevail on appeal must demonstrate that the Commission has either misread the plain meaning of Section 252(i) or if Section 252(i) is subject to more than one interpretation, that the

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[35] First Report and Order, FCC 96-325 at ¶ 1310.

[36] Rosado v. Wyman, 397 U.S. 397, 415 (1970); U.S. v. Jersey Shore State Bank, 781 F.2d 974, 977 (3d Cir. 1986) ("any construction of a particular statutory scheme a 'dead letter' is disfavored and to be avoided"); Marsano v. Laird, 412 F.2d 65, 70 (2d Cir.) ("an interpretation which emasculates [a statute] should be avoided if possible"); Wilshire Oil Co. of Cal. v. Costello, 384 F.2d 241 (9th Cir. 1965) (statute should not be construed so as to be rendered meaningless).

[37] First Report and Order, FCC 96-325 at ¶ 1311; Report of the Committee on Commerce, Science and Transportation on S. 652, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22..

[38] Id. at ¶¶ 13112 - 16.

Commission's interpretation is unreasonable, U S West will not succeed on the merits of its arguments.[39]

With respect to its default pricing proxies, the Commission is on equally firm ground. The default pricing proxies were adopted as interim measures to expedite implementation of the Congressional intent to speed the availability of competitive local telecommunications offerings.[40] As interim guides, the default pricing proxies will only apply until such time as individual States undertake necessary cost studies -- an exercise which is mandated by the 1996 Act and which the Commission has encouraged the States to engage in expeditiously.[41] As described by the Commission:

> While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. . . . Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply.[42]

Certainly, the default pricing proxies adopted by the Commission are consistent with its statutory mandate to "establish regulations to implement the requirements of [Section 251 of the 1996 Act]," including the requirements that interconnection and unbundled network

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[39] Chevron U.S.A., Inc. v. Nat'l Resources Defense Counsel, 476 U.S. 837, 842 (1984).

[40] First Report and Order, FCC 96-325 at ¶ 619.

[41] Id.

[42] Id.

elements be made available at just, reasonable and nondiscriminatory rates and that retail services be offered at wholesale rates.[43] Tellingly, however, the default pricing proxies do not bind the States. The default pricing proxies can be avoided simply by undertaking requisite cost studies (or demonstrating that cost studies already performed are consistent with federal pricing guidelines). ILECs such as U S West can limit the use of default pricing proxies by facilitating State costing exercises. In short, U S West's objections to the default pricing proxies are at best overstated and clearly insufficient to support a plausible legal challenge to the Commission's First Report and Order.

[43] 47 U.S.C. §§ 251(c) (2), (3), (4), (d) (1).

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to summarily deny U S West's Request for a Stay Pending Judicial Review filed in the captioned docket and to permit the pro-competitive rules adopted in its First Report and Order to become effective as currently scheduled.

Respectfully submitted,

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I, Jeannine M. Greene, hereby certify that copies of the foregoing document were mailed this 13th day of September, 1996, by United States First Class mail, to the following:

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